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CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~891~~ 112

THE UNITED STATES OF AMERICA

vs.

EDWARD BENZ

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED MAY 13, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 891

THE UNITED STATES OF AMERICA

vs.

EDWARD BENZ

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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113615—30

1 In United States Circuit Court of Appeals for the Third Circuit

UNITED STATES OF AMERICA, APPELLANT
vs.
EDWARD BENZ, APPELLEE

March term, 1930
No. 4386

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before BUFFINGTON and DAVIS, Circuit Judges, and JOHNSON, District Judge

CERTIFICATE TO THE SUPREME COURT

Filed April 23, 1930

Statement of facts

In order to be guided to a proper decision of this case, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and therefore, under authority of section 239 of the Judicial Code, certifies a question of law arising from the following facts:

Edward Benz was indicted at the June term, A. D. 1929, of the District Court of the United States for the Eastern District of Pennsylvania for a violation of the national prohibition act. On a plea of guilty, entered at the December term, A. D. 1929, of the said court, he was sentenced to imprisonment for a term of ten
2 months to commence December 27, 1929. He has been in prison since that date. On a petition by Edward Benz praying that his sentence be modified, the District Court on March 7, 1930, before the expiration of its said December term, and over the objection of the United States, made an order "that the sentence heretofore imposed upon the above-named defendant on December 12, 1929, of "'Imprisonment in the Mercer County jail, at Trenton, N. J., for a term of ten (10) months from December 27, 1929,' be changed and modified to the following:

"'Imprisonment in the Mercer County jail, at Trenton, N. J., for a term of six (6) months from December 27, 1929.'"

From that order the United States appealed. Pending the appeal the Circuit Court of Appeals, feeling that the question raised was one of importance to the administration of Federal criminal law and therefore should be certified to the Supreme Court, and being conscious that pending the certification the defendant might have served the full term of the sentence originally imposed, made an order for his release from prison upon the expiration of the shorter amended term, upon condition that he give bond for his return to prison to serve out the remainder of the longer term if the amended sentence should be found unlawful.

The question of law growing out of the foregoing facts upon which the Circuit Court of Appeals desires instruction by the Supreme Court of Appeals desires instruction by the Supreme Court is this.

Question certified

After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case,
3 and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?

Dated April 16, 1930.

(Signed) JOSEPH BUFFINGTON,
Circuit Judge.
J. WARREN DAVIS,
Circuit Judge.
ALBERT W. JOHNSON,
District Judge.

[File endorsement omitted.]

4 [Clerk's certificate to foregoing certificate omitted in printing.]

[Endorsement on cover:] File No. 35022. U. S. Circuit Court of Appeals, Third Circuit. Term No. 891. The United States of America vs. Edward Benz. Certificate. Filed May 13, 1930. File No. 35022.

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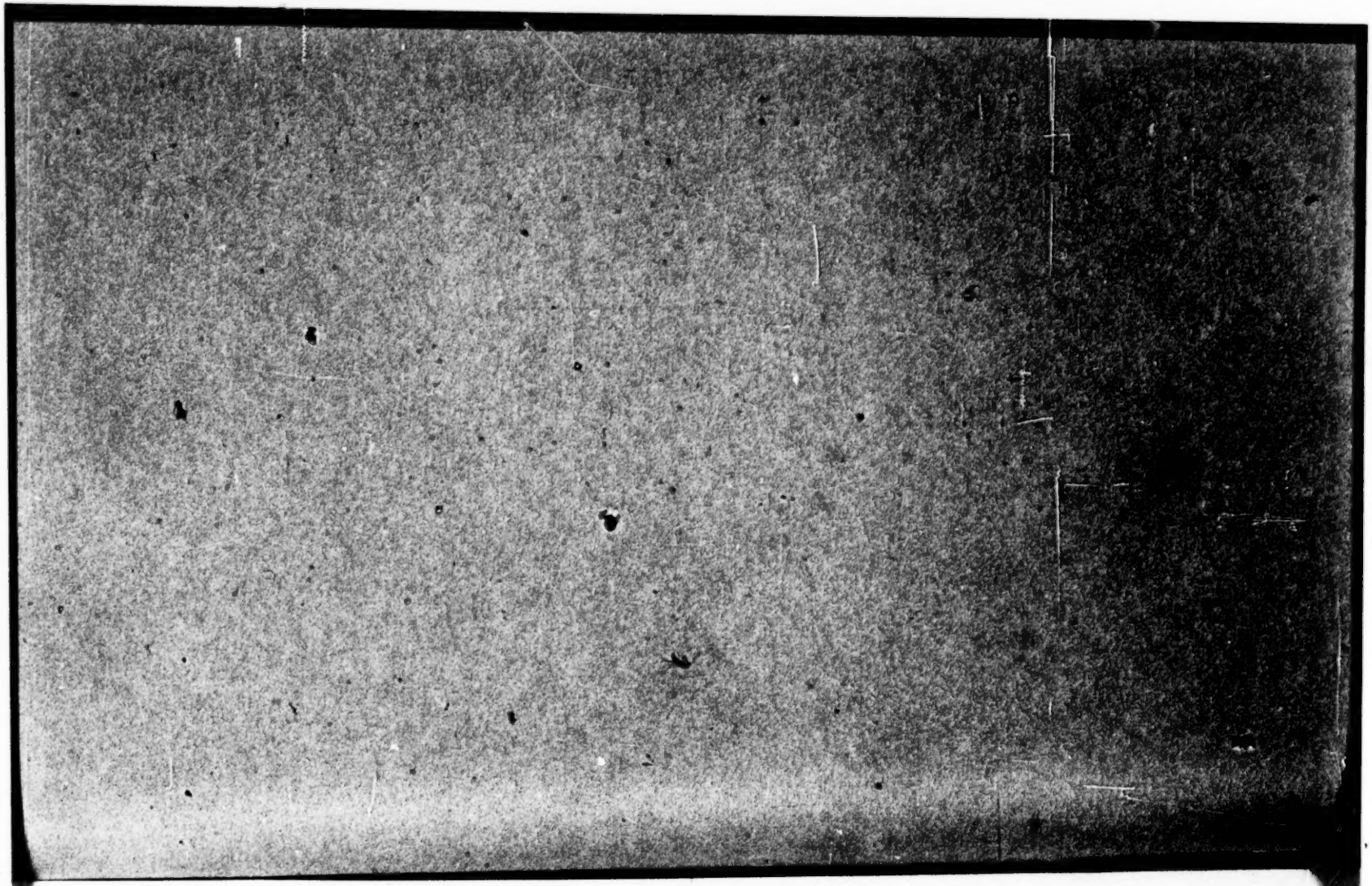

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No. 112

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA

v.

EDWARD BENZ

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its order which the Government is seeking to have reviewed will be found in the certificate. (R. 1.)

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on May 13, 1930. The jurisdiction of this Court is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

While the period for which the appellee was originally sentenced has now expired, the certificate shows (R. 1) that he was released at the expiration of the shorter term fixed by the amended sentence, upon the giving of a bond for his return to serve the remainder of his original sentence if the amended sentence should be declared void. As he remains subject to be recommitted if this Court should hold that the District Court was without power to amend the sentence, the case is not moot.

QUESTION PRESENTED

The question certified is the following:

After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?

STATEMENT

The facts are set forth in the certificate as follows:

> Edward Benz was indicted at the June term, A. D. 1929, of the District Court of the United States for the Eastern District of Pennsylvania for a violation of the national prohibition act. On a plea of guilty, entered at the December term, A. D. 1929, of the said court, he was sentenced to imprisonment for a term of ten months to commence December 27, 1929. He has been in prison since that date. On a petition by Edward Benz pray-

ing that his sentence be modified, the District Court on March 7, 1930, before the expiration of its said December term, and over the objection of the United States, made an order "that the sentence heretofore imposed upon the above-named defendant on December 12, 1929, of—

" 'Imprisonment in the Mercer County jail, at Trenton, N. J., for a term of ten (10) months from December 27, 1929,' be changed and modified to the following:

" 'Imprisonment in the Mercer County jail, at Trenton, N. J., for a term of six (6) months from December 27, 1929.' "

From that order the United States appealed. Pending the appeal the Circuit Court of Appeals, feeling that the question raised was one of importance to the administration of Federal criminal law and therefore should be certified to the Supreme Court, and being conscious that pending the certification the defendant might have served the full term of the sentence originally imposed, made an order for his release from prison upon the expiration of the shorter amended term, upon condition that he give bond for his return to prison to serve out the remainder of the longer term if the amended sentence should be found unlawful.

SUMMARY OF ARGUMENT

I

The trial court for many purposes has power to revoke or amend its judgment in a criminal case during the term in which the judgment was en-

tered, even though the execution of the sentence by the defendant has commenced. But this power of the trial court over its judgments is not complete, and several limitations upon it follow from the decisions of this Court.

An examination of the English and colonial authorities prior to the adoption of the Federal Constitution does not shed any clear light upon the powers which the courts exercised at that time with respect to the present question. There are no express constitutional or statutory provisions which seem to have a direct bearing on the problem.

II

The decisions of this Court and of other courts lend support to the conclusion that the beginning of service of a valid sentence ends the power of the court, even in the same term, to change it. Although there are no decisions of this Court which involve the precise question now presented, there are at least three decisions which contain expressions favorable to our contention. The decisions of the lower Federal courts also support the position of the Government. Although there is some conflict in the decisions of the state courts upon the question, we contend that the greater number and the better reasoned of these decisions reach the conclusion that the trial court has no power to alter or amend a valid sentence after the defendant has been committed.

III

Considerations regarding the division of powers between the judiciary and the other branches of the Government support the same conclusion. The doctrine of separation of powers is not a rigid formula nor a technical rule of law, but we submit that it furnishes a useful guide in determining the extent of judicial power which may conflict with the exercise of executive or legislative authority. In *Ex parte United States*, 242 U. S. 27, and in *United States* v. *Murray*, 275 U. S. 347, this Court has indicated limitations upon the judicial power which are derived from the doctrine of separation of powers. The latter of these two decisions is, we submit, especially pertinent in the consideration of the present case.

The Constitution has given to the President power to pardon offenses, and Congress by appropriate legislation has established a Board of Parole. Both the constitutional and the legislative grants indicate an intention that the power to reduce the length of a sentence after it has been partially served should be exercised by the executive and not by the courts. We contend further that in the absence of specific legislation a result should not be reached which would impose upon the district judges the duty of hearing petitions for reduction of sentences validly imposed which properly should be addressed to another branch of the Government.

ARGUMENT

I

PRELIMINARY STATEMENT

We contend that after a sentence has been validly imposed in a criminal case and service of the sentence has begun, the District Court is without power to amend the sentence, and that, therefore, the order entered in this case reducing the sentence was erroneous.

It is, of course, settled that for many purposes the trial court has power to revoke or amend its judgment in a criminal case during the term in which the judgment was entered, even though the execution of the sentence by the defendant has commenced. Thus, the trial court may grant a new trial during the term in which the judgment was rendered after the defendant has commenced to serve his sentence. *Basset* v. *United States,* 9 Wall. 38.[1] And if the court sentenced the defendant to imprisonment in an institution in which it had no power to order his confinement, the defendant may be recalled and resentenced to the proper institution. *In re Bonner,* 151 U. S. 242.[2] Fur-

[1] The court can not grant a new trial after the expiration of the term. *United States* v. *Mayer*, 235 U. S. 55.

[2] See also *United States ex rel. Whitaker* v. *Mathues*, 9 F. (2d) 913 (C. C. A. 3d); *Ex parte Waterman*, 33 Fed. 29 (N. D. N. Y.); *In re Graves*, 117 Fed. 798 (E. D. Wis.). The defendant may be resentenced in such a case even after the term has expired. *Hammers* v. *United States*, 279 Fed. 265 (C. C. A. 5th).

thermore, if the sentence imposed is void because contrary to the terms of the statute, there is no doubt that the court may correct its judgment,[3] and this may be done even after the term has expired.[4]

On the other hand, it is clear that the power of the trial court over its judgments is not unlimited even during the term at which the sentence was imposed. One such limitation is illustrated by the decision in *Ex parte Lange,* 18 Wall. 163, which is discussed *infra,* pp. 10–11. Another limitation on the power of the trial court appears in the decision in *Ex parte United States,* 242 U. S. 27, where it was held that the trial court in the absence of statute could not validly suspend the execution of its sentence. And another limitation is found in the decision in *United States* v. *Murray,* 275 U. S. 347, where it was held that the court had no power to grant probation under the Federal Probation Act after service of the sentence had commenced, even though the term at which the sentence was imposed still continued.

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[3] *United States* v. *Carpenter*, 151 Fed. 214 (C. C. A. 9th); *Biddle* v. *Thiele*, 11 F. (2d) 235 (C. C. A. 8th); *Cahill* v. *Biddle*, 13 F. (2d) 827 (C. C. A. 8th); *Biddle* v. *Shirley*, 16 F. (2d) 566 (C. C. A. 8th); *Ex parte Peeke*, 144 Fed. 1016 (D. N. J.); *Ex parte Harlan*, 180 Fed. 119 (N. D. Fla.). *In re Johnson*, 46 Fed. 477 (C. C. D. Mass.), is apparently *contra.*

[4] *Bryant* v. *United States*, 214 Fed. 51 (C. C. A. 8th); *Ex parte Peeke*, 144 Fed. 1016, 1020 (D. N. J.).

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It thus appears that there is no basis upon which it can be contended that as a matter of logical necessity the power of the court over its sentence in a criminal case does, or does not, end when the defendant begins to serve his sentence. But the distinction between the correction of judicial error and the amendment of a valid sentence seems to be clearly drawn.

One approach to the consideration of the problem of the extent of the judicial power is to determine whether the particular power in question was exercised at the time of the adoption of the Constitution; but an examination of the English and colonial authorities prior to that time does not shed any clear light on the problem.[5]

There are no express constitutional or statutory provisions which seem to have a direct bearing on the problem. But we contend below (pp. 16–22) that the doctrine of separation of powers implied from the Constitution requires a decision that the

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[5] There are two English decisions in the period shortly after the adoption of the Federal Constitution which indicate that the English courts at that time did regard themselves as having power to amend an erroneous sentence after the commitment of the defendant. In *Rex* v. *Fletcher*, R. & Ry. C. C. 58, 60 (1803), it was said that "the sentence may be corrected or altered at any time during the assizes." And in *King* v. *Price*, 6 East 323, 328 (1805), the sentence of the defendant was increased during the term, when the original sentence imposed had been erroneous. See 1 Chitty, Criminal Law 722. See also the material collected in the dissenting opinion of Mr. Justice Clifford in *Ex parte Lange*, 18 Wall. 163, 178.

power exercised in this case by the trial court was an interference with the powers of the other branches of the Government, and that it was consequently erroneous.

With the foregoing considerations as a background, we shall discuss the decisions of this and of other courts and present certain other contentions which, we submit, tend to support the conclusion that the power of the trial court to alter or amend its sentence in the situation disclosed by the certificate in this case ceases when the defendant has been committed to the custody of the executive authorities.

II

THE DECISIONS OF THIS COURT AND OF OTHER COURTS TEND TO SUPPORT THE CONCLUSION THAT THE BEGINNING OF SERVICE OF A VALID SENTENCE ENDS THE POWER OF THE COURT EVEN IN THE SAME TERM TO CHANGE IT

There is apparently no decision of this Court which involves the precise question which is now presented. But there are at least three decisions in which this Court has referred to the question and in which there are expressions favorable to our contentions.

In *Ex parte Gordon*, 1 Black 503, it appeared that the defendant had been convicted of piracy and sentenced to death, and a warrant had been issued and placed in the hands of the marshal. The defendant thereupon applied for a writ of prohibition from this Court to restrain the judges of

the lower court and the marshal from proceeding further in the case. This Court refused the writ, giving as its reason, among others, that (p. 505)—

> the case has now passed out of the hands of the court, and the warrant is in the hands of the marshal commanding him to execute the judgment of the court. The Circuit Court itself has not now the power to recall it, * * *.

Perhaps the leading case in this Court on the subject is *Ex parte Lange,* 18 Wall. 163. Although this decision is not controlling here because of the difference in facts, it has frequently been cited for the proposition that the court has no power to reduce a sentence after the prisoner has been committed. In that case the trial court imposed a sentence of both fine and imprisonment, although the statute authorized a sentence of fine or imprisonment. The defendant entered upon the service of his sentence of imprisonment and also paid the fine, which was received by the clerk and deposited in the United States Treasury. Thereupon the defendant applied for a writ of *habeas corpus;* the court then revoked the original sentence and imposed a prison sentence the same as the original prison sentence, but omitted the fine. The defendant's money was not returned because it was in the public treasury. Under the circumstances, this Court held that by paying the fine the prisoner had executed one of the alternative sentences allowed by law and that to impose in addition a prison sen-

tence was to punish him twice for the same offense. In the course of its opinion, this Court said (pp. 168, 174):

> The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest.
>
> * * * * *
>
> If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first. * * *

The latest decision of this Court in which the subject is mentioned is *United States* v. *Murray*, 275 U. S. 347. In that case it was held that when

a person sentenced to imprisonment by a District Court has begun to serve his sentence, that court has no power under the Probation Act to grant him probation, even though the term at which sentence was imposed has not expired. This Court in its opinion said (p. 358):

> The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte Lange,* 18 Wall. 163.

The power to grant probation when imposing sentence is a part of the power to impose the sentence. It follows that *United States* v. *Murray, supra,* should be decisive in the instant case.

The first Federal court case directly deciding the present question appears to be *Miller* v. *Snook,* 15 F. (2d) 68 (N. D. Ga.).[6] In that case a sentence of 18 months' imprisonment in the Atlanta Penitentiary was imposed. After commitment had issued and the marshal was on his way to the penitentiary with the prisoner, the court, during the same term, but without notice to the marshal, made an order reducing the sentence to a year and

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[6] There is language favorable to the Government's contentions in several other decisions of the lower Federal courts, but the present question was not actually involved in those cases. See *United States* v. *Howe*, 280 Fed. 815, 819 (C. C. A. 2nd); *Stewart* v. *United States*, 300 Fed. 769, 777 (C. C. A. 8th); *Archer* v. *Snook*, 10 F. (2d) 567, 568 (N. D. Ga.); *Hynes* v. *United States*, 35 F. (2d) 734, 735 (C. C. A. 7th); *Cisson* v. *United States*, 37 F. (2d) 330, 332 (C. C. A. 4th). And see *In re Graves*, 117 Fed. 798 (E. D. Wis.), apparently *contra*.

a day. Upon instructions of the Attorney General, the warden treated the order as void and refused to release the prisoner after the expiration of the year and a day, whereupon the prisoner sought his release on *habeas corpus*. In holding that the trial court's order reducing the sentence was void, it was said (p. 69):

> The general rule is that at any time during the term the court has power to reconsider its judgment, and to revise and correct it by mitigating and even by increasing its severity, where the original sentence has not been executed or put into operation. Where defendant, however, has executed or entered upon the execution of a valid sentence, the court can not, even during the term at which the sentence was rendered, set it aside and render a new sentence, nor can it amend the judgment so as to be in effect a new sentence. * * * It has been held that, where a sentence has been partly executed, it may be revised, and another in diminution or mitigation substituted for it during the term; but, so far as such cases have been observed by me, they were either those in which an oral judgment had not been finally reduced to writing and recorded as the judgment of the court, or else were cases in which it was the prisoner who was seeking to set aside the entire judgment because of the diminution, the courts holding that it did not lie in his mouth to complain of that which was in his favor. * * *.

Here, however, it is the other party to the case, the prosecuting government, which is contending that the effort to mitigate is in excess of the power of the judge and ineffectual to alter the original sentence. * * * Logically, if the reason why an increase can not be made is a want of power in the court, that want of power prevents any alteration of the substance of the sentence. Under our system of government the judicial and executive functions are very substantially separated. The ascertainment of guilt and the fixing of punishment are essentially judicial. The seeing that the punishment is executed and enforcing the judgment of the court is executive. Discretion is given the courts in fixing punishment before execution begins, but after execution commences the prisoner is considered to be beyond the power of the court and in the hands of the executive. The rights of prosecution and prisoner then become fixed. By losing possession of the prisoner, the court loses control of his case, unless control is resumed by some proper proceeding, such as a motion for a new trial or a habeas corpus. The executive may afterwards commute or pardon, but the judge can do neither. Yet the effect of his then altering or reducing the sentence would be commutation or pardon to that extent.

Considering our frame of government, it would seem that the power of the court should logically end when the prisoner passes into the custody and control of the executive

> under a legal and valid sentence. The commitment is the document which marks the surrender by the court to the executive of the prisoner. It is issued by the clerk of the court to the keeper of the prison and in the name of the President, and authorizes the prison keeper to receive and hold the prisoner. In a jail sentence, when a prisoner is actually committed to jail, unquestionably he is in the hands of the executive for the execution of that sentence.

Another decision sustaining the Government's contentions is *Yutz* v. *Pearman,* 33 F. (2d) 906 (E. D. S. C.).

The decisions of the state courts on the subject are in some conflict.[7] But we believe that the greater number and the better reasoned of these decisions support the Government's contentions. Apparently without exception the state courts hold that the trial court has no power to increase a valid sentence even at the same term after the defendant

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[7] The following decisions are in accord with the Government's contention: *Emerson* v. *Boyles*, 170 Ark. 621; *Tanner* v. *Wiggins*, 54 Fla. 203; *State* v. *Ensign*, 38 Idaho 539; *Brabandt* v. *Commonwealth*, 157 Ky. 130; *State* v. *Davis*, 31 La. Ann. 249; *State ex rel. Reid* v. *District Court*, 68 Mont. 309; *Commonwealth* v. *Mayloy*, 57 Pa, 291.

The following cases are opposed to the Government's contention: *Plain* v. *State*, 60 Ga. 284; *Ammon* v. *Johnson*, 3 Ohio Cir. Ct. 263; *Matter of Brittain*, 93 N. C. 587. But in *Plain* v. *State*, it was the defendant who objected to the reduction, not the Government; and in *Ammon* v. *Johnson*, the offense for which the sentence was imposed was a contempt of court.

has commenced to serve the original sentence.[8] If, as these courts hold, the trial court lacks power to increase a valid sentence after the defendant has been committed, it would seem to follow that the court must likewise lack power to decrease such a sentence.

III

CONSIDERATIONS REGARDING THE DIVISION OF POWERS BETWEEN THE JUDICIARY AND THE OTHER BRANCHES OF GOVERNMENT TEND TO SUPPORT THE CONCLUSION THAT THE POWER OF THE TRIAL COURT TO AMEND A VALID SENTENCE SHOULD CEASE WHEN THE DEFENDANT HAS BEEN COMMITTED

The doctrine of separation of powers is, of course, not a rigid formula nor a technical rule of law. From the beginning, in considering acts of the legislature and of the executive, this Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction. Although the Constitution (Art. II, Sec. 2, Cl. 1) gives to the President power "to grant Reprieves and Pardons for Offences against the United States," this Court has held that congressional acts of amnesty are valid (*Brown* v. *Walker,* 161 U. S. 591, 601), that Congress can give the Secretary of the Treasury power to remit fines and forfeitures (*The Laura,* 114 U. S. 411), and con-

[8] See *State* v. *Meyer*, 86 Kan. 793; *Brown* v. *Rice*, 57 Me. 55; *People* v. *Meservey*, 96 Mich. 223; *In re Richards*, 150 *Mich.* 421; *In re Jones*, 35 Neb. 499; *People* v. *Sullivan*, 54 Misc. 489; *State* v. *Cannon*, 11 Ore. 312.

versely, that the President may pardon a criminal contempt (*Ex parte Grossman,* 267 U. S. 87).

These decisions make it clear that the doctrine of separation of powers does not necessarily require the decision of this case in favor of the Government; and we make no such contention. But we submit that the doctrine does furnish a useful guide which should be taken into account in defining the power of a court which may conflict with the exercise of executive or legislative authority.

This Court has drawn the line between the judicial and executive power in similar cases, and in each instance it has indicated that the judicial power should be restricted by the implications drawn from the doctrine of separation of powers. There are at least two decisions of this Court furnishing persuasive analogies which tend to support the Government's position in this case.

In *Ex parte United States,* 242 U. S. 27, this Court had before it the question whether a district judge, after the imposition of a sentence, had power to suspend the execution of the sentence at the same term at which the sentence was imposed and before the commitment of the defendant. It was held that, in the absence of a statute, such a power was not to be exercised by the judiciary within the division of functions established by the Constitution. This Court said (pp. 51–52) that the exercise of such a power—

> in the very nature of things amounts to a refusal by the judicial power to perform a

> duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution.

More recently in *United States* v. *Murray,* 275 U. S. 347, *supra,* the defendant had been sentenced to three months' imprisonment, and, on the same day, he was delivered by the United States marshal, in pursuance of the sentence, to the jail keeper and commenced to serve the sentence. On the next day, and during the same term of court, the District Court entered an order placing him on probation. This Court held that the power to grant probation under the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Title 18, Secs. 724–727) ceased when service of the sentence commenced.

This decision, we submit, is logically decisive in the instant case. Although it involved in part the interpretation of the Probation Act, the considerations which led this Court to hold the power of the trial court under that Act ceased when the defendant entered upon the service of his sentence, lead to the conclusion that in the present case the power of the court over the sentence ended at the same time. The granting of probation at the time of sentence is a part of the judgment of the trial court, and in itself an exercise of the power to impose sentence. If the court can not amend its judgment at the term at which it was entered so as to grant probation, we submit that the trial court

likewise does not have power to amend its judgment by reducing the length of the sentence. The power as to probation "passed immediately after imprisonment began" (p. 359). The power to determine the length of the sentence must, we submit, pass at the same time.

It is a truism that those functions which are essentially or primarily judicial should be exercised by courts; those functions which are primarily executive or legislative should be exercised by the executive or the legislature. Of course the division between the powers is not precise. In many places they overlap, and to a very considerable extent their distribution is subject to the control of the legislature. But the power to reduce a sentence after it has been validly imposed and partially executed is essentially an exercise of the power to pardon or commute the sentence, and such power, we contend, is historically and essentially an executive power. Neither the Constitution nor any statute confers such power upon the courts. The ascertainment of guilt and the fixing of punishment, within the limits prescribed by the legislature, are essentially judicial. The court is often given discretion in fixing the punishment and may take into consideration any mitigating circumstances or other factors which it regards as material. But when the court has imposed a valid sentence and has issued its commitment, and the defendant is delivered and held in custody by

the executive, to reduce the sentence thereafter is an interference with executive powers. The Constitution has given to the President power to pardon offenses, including the power to commute sentences, and Congress by appropriate legislation has established a Board of Parole (Act of May 13, 1930, c. 255, 46 Stat. —, amending Act of June 25, 1910, c. 387, 36 Stat. 819; U. S. C., Title 18, Secs. 714–723) with power to parole offenders.

Both the constitutional and the legislative grants indicate an intention that the power to reduce the length of a sentence after it has been partially served should be executed by the Executive and not by the courts. Although the constitutional grant of the power to pardon, and the legislative grant of the power to parole are not in terms exclusive, we submit that the exercise by the courts of a power which is in substance equivalent to these powers is essentially an interference with the other branches of the Government. It will readily be seen that if orders of the nature here involved were sustained and such a practice became general, it would very seriously interfere with the administration of the parole system and the power of executive clemency. Nor is there any need that the courts be given this power in aid of any power essentially judicial. With the power to grant a new trial, with the power to correct a sentence erroneous in law, with the defendant's right to an appeal in case of error, and with the probation system, the courts have ple-

nary judicial power and are entirely unhampered in its exercise. Anything more would be an invasion of executive power to mitigate the sentence if mitigation for any reason be warranted.

In the absence of specific legislation a result should not be reached which will impose upon the district judges the duty of hearing petitions for the reduction of sentences validly imposed which properly should be addressed to another branch of the Government. There would be no limit to the labor imposed upon trial courts if during the same term every individual convicted and sentenced could file a petition asking that his sentence be reduced. Once sentence has been imposed and service of it has begun, the power of the court over the prisoner should cease and any mitigating circumstances should be directed to the consideration of the executive of other officials invested with power by the legislature. This consideration was apparently of weight in the decision of *United States* v. *Murray*, 275 U. S. 347, *supra*, where this Court, in considering the related question under the Probation Act, said (pp. 356–357):

> Nor can we suppose that Congress would wish to grant such extended power in all but life and capital cases to the district judges and thus subject each to the applications of convicts during the entire time until the full ending of the sentences. This would seem unnecessary for the hard-worked district

> judges with their crowded dockets. A more reasonable construction is to reconcile the provisions for probation, parole and executive clemency, making them as little of a repetition as we can. Executive clemency must of course cover every form of relief from punishment. The parole statute provides a board to be invested with full opportunity to watch the conduct of penitentiary convicts during their incarceration and to shorten it not only by the regular monthly reduction of days but by a larger diminution by parole.

The importunities of friends and dependent relatives in such cases are never ending so long as there is the slightest hope that the judge may be induced by sympathy to modify a judgment which has been considered and rendered according to law in termination of judicial process. From such appeals the judge should be relieved when he has imposed a valid sentence which has been executed by the commitment.

CONCLUSION

The question certified should be answered in the negative.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 112

THE UNITED STATES OF AMERICA

v.

EDWARD BENZ.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR EDWARD BENZ.

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(35,022)

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Jurisdiction.

As stated in the Government's Brief, jurisdiction of the court is conferred by Section 239 of the Judicial Code; and the case is not moot, since the appellee will be recommitted if this Court should hold that the District Court was without power to amend the sentence.

I. Summary.

The true limitation of a court's power to amend a sentence is that the amendment must be made *within the term* when the sentence is imposed. This power was always exercised in England, and the judges increased and decreased sentences before the judgment was entered and the record completed at the end of the sessions. The American courts have limited the exercise of the power to a mitigation of the sentence. One decision of the United States Supreme Court is based on a recognition of the right of the trial judge to cut a sentence within the term. The limitation urged by the Government has no support in legal tradition, and is not called for by considerations of logic or of policy.

II. English Law.

There must of course be some arbitrary limit on the court's power over its own judgments, some final point of time after which it is too late for the judge to change his mind. Sessions, or the term of court, was considered as a single day, during which the court could reconsider and amend. The judgment of the court did not become final till it was entered on the rolls at the end of the session, and was thus given solemn external completion. But during term—in civil as in criminal cases—judgments remained unrecorded and were always subject to change.

Coke speaks of the rule and of its reason (Coke on Litt., 260 (*a*)):

"Of courts of record you may read in my Reports: but yet during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when the terme is past, then the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie."[1]

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[1] This quotation is preceded by the following: "(1) Recordum, is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of court of justice which hath power to hold plea according to the course of the common law, of reall or mixt actions, or of actions *quare vi et armis*, or of personall actions, whereof the debt or damage amounts to fortie shillings or above, which we call Courts of Record, and are created by parliament, letters patent, or prescription.

It is aptly derived of *recordari*, which is to keepe in memorie or record, as it is said, *quod dicere nihil aliud est quam recordari;* and in the same sense the poet useth it, *si rite audita recordor*. But legally records are restrained to the rolles of such only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *secundum legem et consuetudinem Angliae*. And the rolles being the records of memorialls of the judges of the court of record, import in them such uncontrollable credit and veritie, as they admit no averment, plea, or proofe to the contrarie. And if such a record be alleaged, and it be pleaded that there is no such record, it shall be tried only by it selfe; and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient."

Thus Chitty (1 Chitty 722):

> "In case of misdemeanors, it is clear the court may vacate the judgment passed, before it becomes matter of record, and may mitigate, or pass another, even when the latter is more severe. And the justices at sessions have the same power during the session, because it is regarded as only one day; but they cannot do it at any subsequent period, unless an adjournment be entered on the roll. And no court can make any ~~allegation~~ alteration, when once the judgment is solmnly entered on the record."

Chitty does not deal differently with sentences of which the execution has already begun. And it would appear from the following examination of the English cases that the judges constantly exercised this power, increasing or decreasing sentences during the term, irrespective of whether the defendant had previously been committed.

In *Regina v. Fitzgerald*, 1 Salk. 401 (1701), it is reported:

> "The defendant being convicted of a scandalous libel, judgment was given against him to pay 100 marks fine, and go to all the Courts in Westminster Hall with a paper in his hat. In Chancery he behaved himself impudently, and justified his offense, for which reason the Court (during term) increased his punishment by imprisonment."

Lord Holt, in an early case, affirmed the Court's power:

> "The Sessions is all one day, and the justices may alter their judgment at any time, while it

> continues (*Inter the Parishes of St. Andrew's Holborn, and St. Clement's Danes,* 2 Salk. 424, 1795)";

and added (2 Salk. 607) in the same case, again before the Court:

> "During the Sessions the order was in the breast of the Court; and though it was drawn up, yet it was so far in the breast and power of the Court, that by the second order it ceased to be a record. *The Court at the Old Bailey have altered and set aside their judgments ten times at the same sessions.* (Italics ours.) * * * So it is of judgments here; which during the same term are in the breast of the Judges * * *"

In *Rex v. Jane Fletcher,* 1 R. & R. 58 (1803), the Court said (p. 60):

> "The sentence may be corrected or altered at any time during the assizes."

In *King v. Price,* 6 East. 323 (1805), the court held that a sentence of one month to Newgate, and then that the prisoner should be "transported beyond the seas for seven years", was not warranted by the statute; and Lord Ellenborough imposed a second sentence "for the purpose of passing upon them a different judgment (which he observed might be done at any time within the same term)."

Not a word, in any of these cases, limiting the court's power to change a sentence only before execution had begun.

Wharton, an accurate student of criminal law, repeats the doctrine in words which assume the broader power, adding the new limitation, developed, as we shall see, in American Courts, that if the sentence has been begun it cannot be increased.

> "As a general practice, the sentence, when imposed by a court of record, is within the power of the Court during the Session in which it is entered, and may be amended at any time during such session, *provided a punishment already partly suffered be not increased* (italics ours—3 Whart. Cr. Pr. 1853)."

III. **Supreme Court Cases.**

Basset v. United States, 9 Wall. 38 (1869), is direct authority for the proposition that a court has power to alter its sentences partly executed within the term. Were it not for *dicta* in the later Supreme Court decisions, particularly the *Murray* case, the *Basset* decision would be conclusive. This was a suit on a recognizance. The prisoner "had been sentenced to imprisonment in the jail of Erie County for six months, *and was sent to that prison.*" (Italics ours. The quotation is from the report.) On motion of the district attorney he was brought back; again on the district attorney's motion the former judgment was set aside, the prisoner was given leave to withdraw his former plea of guilty, and his recognizance was entered conditioned on his appearance during the term. His recognizance was declared forfeited on his failure to appear when summoned. Basset argued (report, p. 39);

> "That there was no indictment as recited in said recognizance pending against their principal when the recognizance was entered into, because they say that he had pleaded guilty to the indictment, and judgment has passed against him, and he had been delivered to the jail of Erie County, *and had entered upon the expiration of his sentence.* (Italics ours.)"

The reporter adds: "*All of this took place during the same term of the Court* (italics are the Reporter's)." The Supreme Court, speaking through Mr. Chief Justice Chase, affirmed judgment on the bond, saying (p. 41), that there could be "no reason to doubt that the Court had power during that term, for proper cause, to set aside the judgment * * * This control of the Court over its own judgment during the term is of every-day practice."

The United States in its brief (p. 6) dismisses the case by citing it to show that a judge may grant a new trial after service of the sentence has begun; and in a foot-note points out that the court cannot grant a new trial after the expiration of the term. The term, then, is the limit of power, not the fact that the prisoner has gone to jail. If, as the United States later argues, the Judge's power ceases when the prisoner is turned over to the executive, how can the *Basset* case be sound? Surely if the Court, after the prisoner has served part of the sentence, can permit him to withdraw his plea and grant a new trial, the Court can likewise shorten his sentence.

Ex parte Lange, 18 Wall. 163, was decided four years after the *Basset* case, Taney writing the opinion,

Clifford dissenting at great length, and Strong joining in the dissent. Lange had been sentenced to a fine *and* imprisonment under a statute imposing fine *or* imprisonment. He paid the fine and served five days in jail. The trial court set aside the sentence and imposed one of imprisonment. This the Supreme Court held error, since a man cannot be twice punished for the same offense. Payment of the fine constituted complete execution of the sentence. But the Court recognizes the power to mitigate a sentence, partly executed (p. 174):

> "If the Court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first."

To put it a little differently the Court, by using the alternative, said in substance that if the lower court had rendered a judgment for two years' imprisonment, after a part of the sentence had been executed, it could have vacated that judgment during the term and rendered a judgment for one year's imprisonment.

In delivering the court's opinion, Mr. Justice Taney said (p. 167):

> "The general power of the Court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable.

> And this is the extent of the proposition intended to be decided in the case of Bassett *v.* United States."

Justice Clifford, dissenting on the ground that payment of the fine was a revocable act, believed that the decision attacked this very power of the court, which the Chief Justice had taken pains to reaffirm, and said (p. 192):

> "Power of a court over its judgments during the entire term in which they are rendered is unlimited. Every term continues until the call of the next succeeding term * * * and until that time the judgment may be modified or stricken out. During the same session or assize or any adjournment thereof, says Mr. Archbold,[1] the Court may vacate the judgment passed upon the defendant, before it has become matter of record, and pass another less or even more severe."

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[1] Archbold's Criminal Practice & Pleading, Pomeroy's 8th Edition, page 593 (*i*), *Judgment amended:*

> "A judgment, pronounced by a court of oyer and terminer or jail delivery, may be altered or amended by the judge, at any time during the same assizes; a judgment by a court of quarter sessions may be altered at any time during the same sessions; and a judgment of the Court of Queen's Bench, at any time during the same term: provided the sentence be not actually entered of record.[1]"

[1] "It has been correctly observed, that the judge during the term, is a living record, and, therefore,

In the language of none of these cases is there a suggestion that execution of sentence should limit this absolute and inherent power.

In *Reynolds v. United States*, 98 U. S. 145 (1878), the lower court had sentenced the defendant to hard labor, the statute under which the sentence was imposed not including hard labor in the sentence, execution of which had begun. The Supreme Court set aside the judgment, and directed that a sentence should be entered omitting the requirement of hard labor (note, p. 168).

In *Bronson v. Schulten*, 104 U. S. 410 (1881), the plaintiff sued to recover overpayments on custom-house duties and obtained a judgment. This was set aside, a reference made, and a new judgment entered on the referee's report and paid. Seventeen years later

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during that period of time, he may alter and supply from his own memory, any order, judgment and decree, which has been pronounced, and this because, having made them himself, he is presumed to retain them in his recollection. But, at common law, after the term has elapsed, the judge has no such power, because it is supposed that there will be a period at which a judge will cease to retain in his memory the things which have been ordered and adjudged, and that period, it is well conceived, may be the end of the term, as he will then be apt to dismiss from his thoughts the things which have been previously passing in them. It is, indeed, a very delicate power, and might be subject to much abuse, especially in criminal cases, if the extent to which it might be carried was not well defined, and properly checked by law. See *The State v. Harrison*, 10 Yerger Tenn. Rep. 542."

the circuit court on motion based on affidavits set aside the judgment. The Supreme Court held error on the ground of *laches*, and because the term had expired. But no consideration was given to the fact that the judgment had been executed. The court reaffirmed the general principal (p. 415):

> "It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court."

Many of the recent Federal decisions, cited by the United States, are based on a *dictum* of Mr. Justice Taft in *U. S. v. Murray*, 275 U. S. 347 (1927). The Chief Justice says (p. 358):

> "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte* Lange, 18 Wall. 163."

But, as we have seen, the *Lange* case is authority for no such proposition, but, as if the court were fearful that it might be misinterpreted, reaffirmed the broader principle which the decision is not intended to weaken.

The *Murray* case is not, as the United States suggests, very nearly controlling in the instant case. The court held that the power to grant probation under

the Probation Act (March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Title 18, Secs. 724-727) must be exercised before execution of the sentence began. The court construed the act narrowly, did not have before it the consideration here involved, and the *dictum* referred to, based on a misconception of the *Lange* case, was unnecessary to the decision. The Chief Justice, construing a statute, believed that Congress would not wish to overburden the hard-worked district judges by subjecting them to applications of convicts for clemency until the final ending of the sentences. But we are not here construing any grant of power, or considering, therefore, the presumed reasonableness of the legislative mind. It is urged simply that the courts have always had the power, essentially a judicial one when exercised in the same term.[1]

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[1] The Supreme Court gives the same reason as the English courts for exercising power over judgments within the term. *Goddard v. Ordway*, 101 U. S. 745, 752 (1879). "The allowance of the appeal * * * was a judicial act of the court in term time. The order was entered on the minutes as part of what was done in the cause by the court while in session (citing *Ex parte Lange* and *Basset v. U. S.*) * * * As part of the 'roll of that term,' they are deemed to be 'in the breast of the court during the whole term.' Bac. Abr., Tit. Amendment and Jeofail, A. Under this rule, we think it clear that the court had the power during the term * * * to set aside the order * * *"

IV. State and Federal Cases.

As has been pointed out by the United States the State decisions are in conflict[1] and about evenly di-

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[1] In favor of the power even after part execution of the sentence: *Plain v. State of Georgia*, 60 Ga. 284 (1878); *State v. Butler*, 18 Atl. (Md.) 1105 (1890); *In the Matter of John Brittain*, 93 N. C. 587 (1885), where the court said (p. 589): "It would be very extraordinary if this form of mitigating a punishment during the sitting in which it was imposed, was to be denied the court, and thus the sentence become irrevocable. Cannot the judge remit part or even all of a fine? If so, is his authority to reduce the term of confinement to be denied?"; *State v. Crook*, 115 N. C. 760 (1894); *State v. White*, 117 N. C. 804 (1895); *Weber v. State*, 58 O. 616 (1898); *Ammon v. Johnson*, 3 O. Cir. 263 (1888); and see also *People v. Dane*, 81 Mich. 36 (1890), which held that where the Court had sentenced a prisoner under an Act which was later found not to apply, it could resentence him after he had begun to serve the former sentence; and *Price v. Commonwealth*, 74 Va. 819 (1880), where the court first discharged the prisoner and later during the term sentenced him. Most of these cases cite *Ex parte Lange* as their authority. As to the cases cited *contra* by the Government (Brief, 15)—*Emmerson v. Boyles*, 170 Ark. 621 (1926), two judges dissented and in the dissenting opinion, after citing the *Basset* case for his authority, the judge says, page 635: "It may be conceded that there is a conflict in the authorities, but, in view of this conflict, it would be best, in my opinion, to follow the Supreme Court of the United States and especially so as we have not heretofore decided the

vided. The digests recognize the exercise of the broader power.[2]

It should be noted that the decisions of the Federal Courts favorable to the Government's contention are all recent, decided since 1922 (U. S. Brief, p. 12). The earliest Federal case rules squarely in favor of the broader power. *In re Graves*, 117 Fed. 798 (1902). The petitioner on a *habeas corpus* had been sentenced

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exact point in issue." In *State v. Ensign*, 38 Ida. 539 (1924), the order of the court annulled and vacated the previous sentence, and it does not appear from the report whether this was done before or after the term; In *Brabandt v. Commonwealth*, 157 Ky. 130 (1914), the court, after sentencing the prisoner to 12 months, later, in denying a new trial, suspended the sentence during good behaviour. An indefinite suspension of sentence is usually held to be illegal; in *State v. Peter Davis*, 31 La. Ann. 249 (1879), the first sentence was for seven months in the parish prison and the second for six months in the penitentiary; and *Commonwealth v. Maloy*, 57 Pa. 291 (1858), is not in point. It held merely that the court may not amend the sentence after the term.

[2] 16 C. J. 1315: "It has been held, however, that where a sentence has been partly executed it may be revised and another in diminution or mitigation substituted for it during the term"; and 25 Enc. L., 2 Ed., 315: "The court cannot, even during the term at which the sentence was rendered, set it aside and render a new sentence. But it may, at any time during the term at which the sentence was rendered, modify it by remitting part of the punishment, even though its execution has already commenced."

to the House of Correction for two years. The warden refused to carry out the sentence because he was not allowed to receive Federal prisoners for such a term under the State law. The petitioner was recalled, after he had served part of his sentence, and sentenced to one and a half years. The District Court said (p. 799):

> "It involves only the inquiry whether the court possessed the power to recall the prisoner, set aside the sentence, and impose another modified sentence during the same term, *notwithstanding the fact alleged that execution of the former sentence had commenced* (italics ours); and, whatever diversity of opinion appears in other jurisdictions, the doctrine is established in the federal courts that such power exists, and that it is applicable as well where the original sentence was in excess of jurisdiction (citing cases)."

The court points out that there was no excess or want of jurisdiction in the original sentence. The court refers to *Ex parte Lange* as recognizing this doctrine, and deciding merely that payment of the fine operated as a satisfaction of the judgment.

The court in the *Graves* case cited, among others, two earlier Federal cases, *Ex parte Waterman*, 33 Fed. 29 (1887), and *U. S. v. Harman*, 68 Fed. 472 (1895). The *Waterman* case held that the court may change the place of imprisonment after sentence and partial execution; and the *Harman* case that where the prisoner had been illegally sentenced, and on appeal the case remanded, he could be sentenced again after he had served four months.

In *Tiberg v. Warren*, 192 Fed. 458 (1911—C. C. A., 9th Circuit), the Circuit Court discharged a prisoner on *habeas corpus;* the respondent then filed a supplemental return, praying that the order of discharge be vacated. The trial judge vacated the order and remanded the prisoner in the same term. The Court of Appeals held this action within the court's power, citing the *Bronson, Basset,* and *Lange* cases (p. 463). The order had actually been executed since the prisoner had been discharged.

It is argued by the Government, based on the reasoning of the recent Federal decisions denying the broader power, that once the prisoner is in the hands of the executive—the marshal or the keeper of the prison—the judicial power ends, and thereafter only executive action can affect the sentence. Yet actually this is not the case. The Government admits that "the trial court may grant a new trial during the term in which the judgment was rendered after the defendant has commenced to serve his sentence" (Brief,p.6). But this is a judicial act exercised after the executive has taken over the prisoner. There can be no doubt of the broad general principle that a court exercises discretion over its judgments within the term in which they are rendered. Why should this power be limited by the exercise of an executive act, which can more logically be considered as done in furtherance of judicial power, carrying it out, not exhausting it. The executive does not act, and cannot act, in these circumstances, independent of the judiciary. It is the "arm of the law", fulfilling the law's command.

And if this discretion existed in early courts is it a wise public policy, assuming that policy and not traditional power is involved, to deny it to the District Courts? Should not rather their hands be strengthened by a broad construction, recognizing their inherent powers wherever they are questioned?

V. Usurpation of the Executive Power.

The Government argues that modification of a sentence by a court in the term in which it was rendered amounts substantially to a pardon, a function of the executive and not of the judiciary under our theory of the separation of powers. Power to reduce sentence, it is said, is essentially an exercise of the power to pardon. But is it? It is admitted that courts can reduce a sentence, validly entered, where no execution has begun. From the point of view of mitigation the effect is the same as if the prisoner had gone to jail. Moreover the act of pardon wipes away the effect of guilt, restoring civil rights. Modification of the sentence has no other effect than to lessen the punishment.[1]

In *Ex parte Grossman*, 267 U. S. 87 (1924), where the court decided that a criminal contempt was pardonable by the President, the converse was contended—that the pardon was an encroachment by the executive on the judiciary, violating the latter's independence and the principle of the separation of powers. The

[1] The power to suspend sentence does not conflict with the power of the Governor to grant reprieves. *In re Buchanan*, 146 N. Y. 264 (1895).

court considered and rejected this argument: "The Federal Constitution," says Chief Justice Taft, page 119, "nowhere expressly declares that the three branches of the Government shall be kept separate and independent * * * (p. 120). The fact is that the Judiciary, quite as much as Congress and the Executive, is dependent on the coöperation of the other two, that government may go on."

Failing back on logic, the Government argues that if courts can diminish a sentence after execution, they should also be able to increase it, and this power the decisions deny them. But it would not seem that the English courts ever had in mind such a distinction (*King v. Price, supra*, p. 5, where the sentence was increased). The cases in this country are perhaps traceable to the greater leniency to criminals found in American criminal practice. And an increase in sentence, although constituting in legal theory but a single judgment, before the end of the term, is in effect double punishment, abhorrent to our system based on constitutional guaranties (*People v. Sullivan*, 54 Misc. (N. Y., 1907) 489).

The question certified should be answered in the affirmative.

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SUPREME COURT OF THE UNITED STATES.

No. 112.—October Term, 1930.

The United States of America, *vs.* Edward Benz	On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[January 5, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case is here on a certificate from the court below under § 239 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938; U. S. C., Title 28, § 346. Benz was indicted for a violation of the National Prohibition Act. He entered a plea of guilty and was sentenced to imprisonment for a term of ten months beginning December 27, 1929. While undergoing imprisonment under this sentence, and before expiration of the term of the federal district court which had imposed the sentence, he filed a petition asking that the sentence be modified. The court, over the objection of the United States, entered an order reducing the term of imprisonment from ten to six months. The government appealed, and the court below, desiring the instruction of this Court, certified the following question:

"After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?"

The contention of the government is that after the defendant has been committed and has entered upon service of a valid sentence, the power of the court to alter the sentence, even at the same term, has come to an end. In addition, some stress is put upon the fact that the powers of the three departments of government are separated by the Constitution, so that one of the departments may not exercise the powers conferred upon either of the others; and it is suggested that from this separation the implication fairly

may be drawn that a reduction by the court of a valid sentence after it has been partly served is, in effect, an invasion of the power to pardon offenses, including the power to commute, vested in the executive by Art. II, § 2, cl. 1, of the Constitution.

The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court. *Goddard* v. *Ordway,* 101 U. S. 745, 752. The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented. *Ex parte Lange,* 18 Wall. 163, 167-174; *Basset* v. *United States,* 9 Wall. 38. In the present case the power of the court was exercised to mitigate the punishment, not to increase it, and is thus brought within the limitation. Wharton, in *Criminal Pl. and Pr.,* 9th Ed., § 913, says: "As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased."

The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This is the basis of the decision in *Ex parte Lange, supra.* There, the punishment prescribed by statute was imprisonment for not more than one year *or* a fine of not less than ten dollars nor more than two hundred dollars; but Lange was sentenced to one year's imprisonment *and* to pay two hundred dollars fine. Five days after the imprisonment had begun, after payment of the fine and during the same term, Lange was brought before the same court on a writ of *habeas corpus*; an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that time. This court stated the rule to be, p. 167: "The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases,

during the existence of the term at which they are first made, is undeniable." The court declared, however, that the power could not be so used as to violate the constitutional guarantee against double punishment, holding (p. 173) that this guarantee applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence:

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."

But the court immediately proceeded to say, p. 174:

"If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first."

Then returning to the question of double punishment, and reciting that Lange had paid the fine and had undergone five days of the one year's imprisonment first imposed, the court said, p. 175:

" . . . can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him *twice* for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

The *Lange* case and the *Basset* case, *supra*, probably would have set at rest the question here presented had it not been for a state-

ment in *United States* v. *Murray*, 275 U. S. 347, 358. In that case this Court held that where the defendant had begun to serve his sentence, the district court was without power, under the Probation Act of March 4, 1925, to grant him probation; and, citing *Ex parte Lange* as authority, said: "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it." But the *Murray* case involved the construction of the Probation Act, not the general powers of the court over its judgments. The words quoted were used by way of illustration bearing upon the congressional intent, but were not necessary to the conclusion reached. That they state the rule more broadly than the *Lange* case warrants is apparent from the foregoing review of that case.

The rule thus being settled for this court by its prior decisions, we need not discuss the conflicting state cases nor the conflicting decisions of lower federal courts which are cited, further than to say that the federal cases cited by the government in support of its position are comparatively recent, and at least in some instances rest upon the general statement in the *Murray* case just quoted. The earlier view is to the contrary. Thus in the case of *In re Graves*, 117 Fed. 798, where a person had been resentenced to serve for a period of one and one-half years after having been imprisoned for a number of days under a sentence of two years, the court refused to discharge him on *habeas corpus*, saying:

"It involves only the inquiry whether the court possessed the power to recall the prisoner, set aside the sentence, and impose another modified sentence during the same term, notwithstanding the fact alleged that execution of the former sentence had commenced; and, whatever diversity of opinion appears in other jurisdictions, the doctrine is established in the federal courts that such power exists, and that it is applicable as well where the original sentence was in excess of jurisdiction. [Citing, among other cases, *Ex parte Lange* and *Basset* v. *United States, supra.*] In Ex parte Lange, supra, the doctrine so stated is distinctly recognized, but the case is distinguished as one where the statute authorized imprisonment, or fine, in the alternative only, and the sentence imposed both; and the majority opinion merely holds that new sentence of imprisonment alone cannot be imposed after payment of the fine, which operated as a satisfaction of the prior judgment. The sentence under which this petitioner is imprisoned is in all respects more favorable to him than was the original sentence, and escape therefrom is sought on the ground of change in

the place of imprisonment after he had 'entered upon the service' of the first sentence.

"As the place of imprisonment was discretionary, and in no sense affected the jurisdiction, and the power of the court over its own judgment within the term is undeniable (Ex parte Lange, supra), I am clearly of opinion that the sentence and commitment in question are valid, and, no ground appearing to grant the petitioner the benefits of a writ of habeas corpus, the application is denied."

With this application of the rule and interpretation of the prior decisions of this Court, we entirely agree.

We find nothing in the suggestion that the action of the district court in reducing the punishment after the prisoner had served a part of the imprisonment originally imposed was a usurpation of the pardoning power of the executive. The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the *enforcement* of the judgment, but does not alter it *qua* judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

The question propounded must be answered in the affirmative.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.